IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

Iqbal Hussain & Anr. vs. The State of Rajasthan.

D.B.Cri. Appeal No.83/1982

Under Section 374 Cr.P.C. against the judgment dated 23.01.82 passed by the Sessions Judge, Udaipur in Sessions Case No.107/1980

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Date of Judgment: 11th December, 2007.

PRESENT

HON'BLE MR.JUSTICE BHAGWATI PRASAD
HON'BLE MR.JUSTICE DEO NARAYAN THANVI

Mr.Niranjan Gaur] for the appellants.
Mr.Sanjay Mathur]

Mr.JPS.Choudhary, Public Prosecutor.

BY THE COURT :(PER HON.MR.BHAGWATI PRASAD,J.)-

The present appeal has been filed by the accused appellants, being aggrieved by the decision of the court of Sessions Judge, Udaipur in Sessions Case No.107/1980 dated 23rd January , 1982.

The prosecution was initiated on the basis of a first information report, lodged by Akbar Ali, on 09.07.80 at police station Hathi Pole. In the written report submitted to the police station, the first informant stated that at about 9-9.15 PM the informant was standing on the betal shop. At that time Shabbir came, he had some conversation and then Shabbir entered into the tea shop. Some time later, he came out of the tea shop. After coming out of the tea shop , he was standing. At that time , Iqbal Hussain Qureshi and Nafiz Ahmed Shekh accused came and started giving knife injuries to the deceased. The deceased went back into the hotel and fell there at the counter. At that time he tried to catch hold of Iqbal Qureshi and Nafiz Shekh but he was threatened by knife. At that time Altaf Radiowala also came. He had seen the incident. Seffuddin Khan and Hamid Ali were also present on the scene of occurrence.

On the basis of the first information report, the investigation was conducted and first information report was registered with the police being FIR No. 80/1980 under section 307 IPC. The injured having succumbed to the injuries, the case was converted into under section 302 IPC. Against both the accused

persons, charges were framed under section 302, 302/34 IPC. Accused denied the charges and claimed trial.

In support of the prosecution case , prosecution examined 27 witnesses . One witness was examined in defence. The trial court, after considering the case of the prosecution, came to the conclusion that the deceased had died due to the injuries sustained by him , therefore, the case was a case of homicide. The prosecution has examined 4 eye witnesses to support its case, namely PW/1 Akbar Ali, the first informant. PW/2 Hamid Ali, PW/3 Seffuddin and PW/14 Altaf Hussain. The trial court has categorically found that PW/1 Akbar Ali and PW/14 Altaf Hussain are not supporting the prosecution case. The trial court has also held that there is no circumstantial piece of evidence to support and corroborate the prosecution case, as the articles recovered have not been found to have been stained with human blood and, therefore, the recoveries are not liable to be pressed into against the accused persons. However, the trial court has held that PW/3 Seffuddin and PW/2 Hamid Ali are the witnesses of sterling worth and therefore, their testimonies can be pressed into service for convicting and sentencing the accused appellants and convicted the accused appellants under section 302, 302/34 IPC and sentenced them to undergo life

imprisonment and a fine of Rs.300/-.

The learned counsel for the appellants , assailing the findings of the trail court , stated interalia that PW/1 Akbar Ali is the author of the first information report. In his court statement, he has categorically stated that as to who were the assailants, could not be identified at that time. This witness has not been turned hostile by the prosecution. According to this witness he had given the report on 10th July, 1980 on a paper that speaks of the non-availability of the names of the assailants with the prosecution in the night. It was only in the morning when the written report is alleged to have been lodged by this witness, that the witnesses have been cooked up and name of the accused have been doctored. Thus, the testimony of PW/1 Akbar Ali knocks out the bottom of the prosecution case.

Further the learned counsel for the petitioner has submitted that PW/6 Krishan Kumar is the owner of the hotel, where the deceased is said to have taken tea. This witness, according to his statement, has refused to say about the assailants. He only states that he saw the injured approaching the hotel and in that view of the matter, if he was not in a position to identify the assailants, any one else cannot claim that they were were in a position to identify as to

who the assailants were. The learned counsel for the appellants further drew the attention of the court towards the statement of PW/7 Dilawar, that deceased was his own brother, who died on 09th July, 1980 at about 09.00 PM He categorically states in his cross examination that he was not informed about the assailants by the 2 witnesses PW/2 Hamid Ali and PW/3 Seffudin, who met him. Admittedly, PW/2 Hamid Ali and PW/3 Seffuddin had not gone to the police to intimate about the case. Their first version about the case was to PW/7 Dilawar and in terms of the principles of res geste as and when a person immediately after the incident, if say something, that is admissible in evidence . If PW/2 Hamid Ali and PW/3 Sefudin immediately after occurrence have not stated anything about the accused persons, which should have been the primary information to the brother of the deceased, to whom they wanted to give information and had gone to his place. If the name of the accused is missing there, then that information is hardly of any consequence and in that background, the testimony of PW/2 Hamid Ali and PW/3 Seffudin may be examined by the court.

According to the learned counsel, both these persons have not been corroborated by any other witness or any kind of circumstantial evidence available on record. Both the witnesses

claim PW/2 Hamid Ali and PW/3 Sefffuddin came when they were sitting inside the tea shop and they had seen the assailants causing injuries to the deceased. If the statement of these 2 witnesses are examined , in the light of the statement of PW/6 Krishan Kumar, owner of the shop, who was sitting on the counter, then it is difficult to assume that they were in a position to see the assailants. Because the person who could conveniently see was PW/6 Krishan Kumar, who was sitting in the counter, where the deceased had come and fallen. These 2 witnesses could hardly see the deceased being inflicted injuries.

PW/2 Hamid Ali and PW/3 Seffuddin claim that when they informed the brother of the deceased, thereafter they went home , a very unnatural conduct. Then PW/2 Hamid Ali also states that he was the person who had put the deceased in scooter taxi but then his hands and clothes were not stained with blood. This is a situation which is very hard to digest because the man had died due to profuse bleeding. He was immediately put in the taxi to be admitted in the hospital . Those who touched such persons would hardly miss getting stained with blood.

The most important aspect of the testimony of these two witnesses is that they do not say that the deceased had earlier come inside the tea shop and consumed tea and then went out. This part is

not seen by them . Not only not seen , but the same has not been deposed. This is a fact which has been incorporated in the first information report. This is also contained in the statement PW/1 Akbar ali , author of the first information report. Thus on a very material aspect these 2 witnesses are silent . In the background that they had not been corroborated about their statement of communicating the entire information of the incident to PW/7 Dilawar, brother of the deceased, who has categorically stated that Altaf and Hamid Ali who came to inform, had not informed about the assailants, then the only inference that can be drawn is that they did not know as to who were the assailants. It is very easy to give the names subsequently, in the manner in which they have given by modulating their thoughts. But in any case, the manner of occurrence and the reason of occurrence have not been stated by any of the prosecution witnesses , including the 2 eye witnesses PW/2 Hamid Ali and PW/3 Seffudin.

Immediately when a man meets, it cannot be expected that the other person will cause him injuries without there being provocation. In the instant case, the prosecution eye witnesses are silent on the point whether there was any immediate cause for the assailants to have caused injuries to the deceased. On the contrary, the narration of the first informant report, coupled with the statement of

PW/7 Dilawar, makes these two witnesses as infirm witness, who cannot be said to be fully reliable. If there are two unreliable witnesses and are not coming forth, with the entire truth, then both of them cannot be expected to corroborate each other. There is no independent corroboration available on record. These two witnesses are not liable to be believed. Implicit reliance cannot be placed on them and if the testimony of these two witnesses is discarded which has been believed by the trial court, then there remains nothing on record against the accused persons.

Per contra, the learned Public Prosecutor submitted that it is a case where the accused was arrested immediately. The accused have been seen by PW/2 Hamid Ali and PW/3 Seffuddin causing injuries. The immediate possibility of the accused having seen by the witnesses causing injuries goes a long way. Therefore, in that background, the findings of the trial court cannot be doubted.

We have heard the learned counsel for the parties and have given our thoughtful consideration to the material available on record.

Admittedly, there is no circumstantial evidence which is

available for corroboration of the eye witnesses. Out of the four eye witnesses produced , two have not been relied by the trail court itself. None of these two eye witnesses have been declared hostile by the prosecution. PW/1 Akbar Ali, the first informant, has categorically stated that it was not possible to know as to who the assailants were? PW/3 Hamid Ali and PW/3 Seffudin have met same night PW/7 Dilawar, who clearly states that they did not intimate to him as to who the assailants were ? He was only intimated about the incident and not about the assailants. This lapse clearly puts us on our guard to judge as to whether PW/2 Hamid Ali and PW/3 Seffudin were in fact the eye witnesses.? When we read their testimony, we do not see any detail coming out in such a fashion which would lend assurance to our mind that they could be the eye witnesses.

According to the prosecution case the deceased had come inside the tea shop before the incident and had gone out. This part of the story is missing from the testimony of PW/2 Hamid Ali and PW/3 Seffuddin. When the deceased fell down,the counter man had seen him falling and this is the time when PW/2 Hamid Ali and PW/3 Seffuddin saw the incident. The man on the counter says that it was not possible to know as to who the assailants were as there was

big crowd. Thus, the claim of PW/2 Hamid Ali and PW/3 Seffuddin, appears to be doubtful. If there is doubt about the veracity of the version of PW/2 Hamid Ali and PW/3 Seffuddin and there is no corroboration available on record and in that background, the appellants are entitled to the benefit of doubt. In that view of the matter, we are not prepared to believe the uncorroborated testimony of PW/2 Hamid Ali and PW/3 Seffuddin, the only version read against the accused appellants by the trial court.

In the result, the only evidence of two eye witnesses having been found by us to be unworthy of credence , there is no material available on record to sustain the findings of the trial court. The accused Iqbal Hussain and Nafiz Ahmed Shekh are entitled to benefit of doubt. In that view of the matter, the conviction and sentence recorded against them are liable to be set aside and are hereby set aside. They are on bail their bail bonds are cancelled. They need not surrender, they are set at liberty.

DEO NARAYAN THANVI), J. **(BHAGWATI PRASAD), J.**

L.George